87-1096

No.

Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT F. WRIGHT, EDWARD L. JACOUBS AND PAMELA GILMORE, TRUSTEE OF THE GILMORE FALMOUTH REALTY TRUST,

Appellants,

v.

ALFRED L. WELCH, III, RAYMOND R. LABOSSIERE, JULIA C. TAYLOR AND JOSEPH COSTA, AS THEY ARE OR WERE MEMBERS OF THE BOARD OF APPEALS OF THE TOWN OF FALMOUTH, MASSACHUSETTS AND PETER GOODALE, AS HE IS THE BUILDING COMMISSIONER OF THE TOWN OF FALMOUTH, MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE APPEALS COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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December 29, 1987

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether current Massachusetts General Laws Chapter 40A, as enacted by Statutes of 1975, Chapter 808, amended by Statutes of 1977, Chapter 829, and as applied to a legal subdivision during a prior statutorily granted protected period are void because they abrogate appellants' vested contractual and property rights guaranteed by Article 1, sec. 10 and Amendment XIV, sec. 1 of the United States Constitution.

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II. Constitutional and rational construction of Statutes of 1975, Chapter 808, as amended by Statutes of 1977, Chapter 829, bars the application of any town by-law increasing lot size until September 18, 1981 (the end of the protected period), after all the lots were conveyed out and therefore buildable under substantially identical provisions of old M.G.L. c. 40A, § 6 or Falmouth by-law § 3421 11

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ROBERT F. WRIGHT, EDWARD L. JACOUBS AND PAMELA GILMORE, TRUSTEE OF THE GILMORE FALMOUTH REALTY TRUST,

Appellants,

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ALFRED L. WELCH, III, RAYMOND R. LaBOSSIERE, JULIA C. TAYLOR AND JOSEPH COSTA, AS THEY ARE OR WERE MEMBERS OF THE BOARD OF APPEALS OF THE TOWN OF FALMOUTH, MASSACHUSETTS AND PETER GOODALE, AS HE IS THE BUILDING COMMISSIONER OF THE TOWN OF FALMOUTH, MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE APPEALS COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Robert F. Wright, Edward L. Jacoubs and Pamela Gilmore, the appellants, appeal from the judgment of the Appeals Court of the Commonwealth of Massachusetts, dated June 30, 1987.

which affirmed the appellees' denial of permits to build single family homes on their respective lots in Falmouth, Massachusetts. Further appellate review was denied by the Supreme Judicial Court of the Commonwealth of Massachusetts on October 1, 1987.

OPINIONS BELOW

The opinion of the Appeals Court of Massachusetts, which appears in the appendix hereto, pp. 2a-8a, is reported in 24 Mass. App. Ct. 409, 509 N.E.2d 923 (1987).

JURISDICTION

This appeal is taken from a judgment of the Massachusetts Appeals Court dated June 30, 1987.

A notice of appeal to this Court, dated December 21, 1987, was timely filed with the Massachusetts Appeals Court, on December 22, 1987. This appeal is being docketed in this Court within ninety (90) days from the Supreme Judicial Court's October 1, 1987, order denying further appellate review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION.

Article 1, section 10,

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal;

coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payments of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ACTS AND STATUTES.*

MASSACHUSETTS GENERAL LAWS.

Former Massachusetts General Laws c. 40A, § 5A
Former Massachusetts General Laws c. 40A, § 7A
Statute of 1975, c. 808, § 3
Statute of 1975, c. 808, § 7
Statute of 1977, c. 829, § 4
Current Massachusetts General Laws c. 40A, § 6

MISCELLANEOUS.*

Falmouth By-Law 3421

*Set forth in the Appendix, at 22a-24a.

HOW THE FEDERAL QUESTION WAS RAISED

At trial, the parties stipulated facts, argued and submitted briefs on the issues presented. The Court was fully informed of the constitutional issues and was provided with bound and indexed, high-lighted, xeroxed copies of references cited which further elaborated constitutional prohibitions against abrogating vested rights during the statutory protected period. The Court acknowledged the protected period and then applied the statutory amendments and by-laws during the protected period in direct violation of constitutional law.

In the Appeals Court, the judges were again fully informed on the constitutional issues, predicated on the same references shown to the Court below. Here again, the Court retrospectively applied subsequent statutory amendments and by-laws. It is interesting to note the underlying rationale of the Court explained in footnote 10 (A. 7a). Here the Court says that the appellants have a "*heavy burden* of persuasion" in establishing that their *vested* rights under former M.G.L. c. 40A, §§ 7A and 5A "have a continuing vitality since the dates set forth in St. 1975, c. 808, §§ 6 and 7, as amended by St. 1977, c. 829, § 4" (emphasis added). The Constitution of the United States did that; the courts below violated those rights by retrospectively applying subsequent amendments despite Article 1, section 10 and the Fourteenth Amendment, section 1.

The Supreme Judicial Court again was fully informed of the constitutional issues in a petition for further appellate review which it declined on October 1, 1987.

THE QUESTIONS ARE SUBSTANTIAL

Zoning by-laws are in a constant state of change. "Protected periods" provide the necessary time to develop land and are

a common component of zoning statutes. However, after a town has authorized a subdivision and imposed substantial contractual duties on the landowner, it has no regard for the landowner's rights to build on the land if the zoning changes. Such a practice is not only unconstitutional, it undermines essential governmental integrity at its primary level.

The lots are currently legal and conveyable. There is no known legal mechanism for undoing a legal subdivision without the full cooperation of all the parties. Individual owners cannot be compelled to cooperate. As the owners die or convey out, the problems escalate. There are a growing number of legal yet unbuildable lots to ensnare innocent buyers or heirs, all of which is unnecessary if the Constitution were enforced.

STATEMENT OF THE CASE

I. Nature of the Case

This is a zoning appeal concerning allegedly unbuildable undersized lots which arose after denial of building permits. The appellants own three lots separate from one another. Each individual's lot is completely separate and apart from any other land that each may own. The individuals applied for building permits on their respective lots. The building permits were denied by the Falmouth Building Commissioner. The Board of Appeals for the Town of Falmouth upheld their denial.

The three lots are part of a subdivision which was approved and endorsed by the Planning Board of Falmouth on September 18, 1974. The lots met all the zoning requirements of the Town when the plans were submitted and continued to be buildable lots up to September 18, 1981, pursuant to former

M.G.L. c. 40A, § 7A (hereinafter, the "protected period"). That period exempted the lots from zoning changes during its existence.

The minimum lot size requirements, where these lots are located, changed from: *15,000 square feet, 100 feet wide, 50 feet frontage*, to: *40,000 square feet. 150 feet wide, 100 feet frontage* during the protected period. Also during this period, a new zoning law, current M.G.L. c. 40A, was passed by Chapter 808 of Statutes of 1975 and amended by Chapter 829 of Statutes of 1977. Current M.G.L. c. 40A, § 6 replaced former M.G.L. c. 40A, § 5A as the "grandfather clause." All Massachusetts towns were given until June 30, 1978, to bring their ordinances into conformity with the new zoning law. Statutes of 1977, c. 829, § 4.

During the protected period, roads were completed within the subdivision and the town released the lots from its covenant (the owners' agreement not to convey lots until the roads were approved by the town) on September 11, 1981. The lots, which were later denied building permits, were put into separate ownership on September 15, 1981. The owners of the subdivided land at that point became the two original owners (appellants Wright and Jacoubs) as separate individuals, two irrevocable trusts with independent trustees and different beneficiaries, a fifth individual, and the widow appellant Gilmore, as Trustee. It is the appellants' contention that since the lots were separately owned before the end of the protected period, their lots qualified for "grandfather" treatment on the day the statutory period of protection ended, and are thus buildable. The Town contends that once the period had run out, it could apply the changes retrospectively to the dates the changes became effective (before the numerous conveyances) and thus the lots were not entitled to "grandfather" protection. The parties submitted stipulated facts conforming substantially to the above at trial.

II. Prior Proceedings

Appellants Jacoubs and Wright applied for building permits on separate lots they each owned individually. Appellant Gilmore also applied for a building permit on a lot she owned in the same subdivision. The three applications for permits were denied by the building commissioner. The building commissioner acknowledged the statutory protection from zoning changes, but nevertheless retroactively applied statutes and by-laws that were subsequently passed during the protected period, abrogating the appellants' vested rights to build on the subdivided lots (A. 20a). Jacoubs, Wright and Gilmore appealed to the Falmouth Board of Appeals. The Board of Appeals denied their appeals. In substantially the same manner as the building commissioner, the Board of Appeals applied changes in the law during the acknowledged statutorily protected period (A. 18a).

Jacoubs and Wright started suit in the Superior Court, as did Gilmore. The two cases were consolidated for trial. The Superior Court upheld the Falmouth Board of Appeals, repeating the error of the building commissioner and the Board of Appeals (A. 14a). The Appeals Court, after hearing of cross-appeals of the owners and the town, affirmed the Superior Court's decision (A. 2a). The appellants then sought further appellate review in the Supreme Judicial Court of the Commonwealth of Massachusetts, which was denied October 1, 1987.

REASONS FOR GRANTING PLENARY REVIEW.

I. Massachusetts General Laws Chapter 40A, as enacted by Statutes of 1975, Chapter 808, and as amended by Statutes of 1977, Chapter 829, unconstitutionally deprives appellants of vested property and contractual rights.

The developers Wright and Jacoubs covenanted with the Planning Board of the Town of Falmouth on September 18, 1974 to build roads and provide utilities to lots in their subdivision, all in accordance with M.G.L. c. 41, § 81U. They further agreed not to convey any lots until released from this covenant by the Planning Board.

The roads were constructed and the Town accepted a bond for $54,582 to secure any additional work needed on the roads and released all the lots from their covenant on September 11, 1981.

In the meantime, the Massachusetts General Laws were amended by St. 1975, c. 808, stating:

> This act shall take effect on January first, nineteen hundred and seventy-six as to zoning ordinances and by-laws and amendments, other than zoning map amendments, adopted after said date.

St. 1975, c. 808, § 7. And, were further amended by St. 1977, c. 829, stating:

> Zoning ordinances and by-laws in effect on said date shall continue to be governed by the provisions of chapter forty A of the General Laws in effect prior to said date until this act is accepted by each respective city or town, provided that no later than June

> thirtieth, nineteen hundred and seventy-eight all zoning ordinances and by-laws shall be brought into conformity with the provisions of this chapter and shall be governed hereby, *and thereafter no provisions of chapter forty A in effect prior to January first, nineteen hundred and seventy-six shall govern zoning ordinances and by-laws.*

St. 1977, c. 829, § 4.

Applying any of the provisions of the new M.G.L. c. 40A to the subdivision prior to September 18, 1981 would impair the vested property rights and the contractual rights (covenant) of Wright and Jacoubs in the approved subdivision by rendering the lots unbuildable.

Such a statutory construction would render the entire act unconstitutional. It would be in direct violation of Article 1, section 10 and the 14th Amendment, section 1 of the U.S. Constitution. *Duke Power Co.* v. *South Carolina Tax Commission*, 81 F.2d 513, 517 (4th Cir. 1936). U.S. Constitution, Art. 1, sec. 10 clearly proscribes the states from impairing established contractual rights. 2 Singer, *Sutherland Statutory Construction*, § 41.0 "Constitutional limitations" (4th Ed.) and cases cited therein.

In the leading case of *Coombes* v. *Getz*, 285 U.S. 434, 52 S.Ct. 435, 76 L. Ed. 866 (1932), the Court stated:

> [N]either vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. . . . The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but

> upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth.

Id. at 442. This reasoning is directly applicable here. Old M.G.L. c. 40A, created a right which neither St. 1975, c. 808, amended by St. 1977, c. 829 or the new M.G.L. c. 40A can destroy by repeal. What vested property rights did Wright and Jacoubs have in the subdivision? They had the right to develop the subdivision and sell and convey to others the subdivided lots. After expending large sums of money on the roads in accordance with their agreement with the town, they conveyed several lots to Gilmore in part payment of the road construction and otherwise conveyed all the lots out to separate entities. To permit the town now to renege on their agreement and say all the lots are unbuildable would be totally unjust and unconstitutional.

In another leading case on the topic of repealed statutes and their effects on vested property rights, this Court has stated:

> The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force.

Ettor v. *Tacoma*, 228 U.S. 148, 155, 33 S.Ct. 428, 57 L.Ed. 773 (1912). In reversing the lower court's decision, the *Ettor* Court declared:

> The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.

Id. at 156 (citations omitted). In the instant case, the seven-year protection of old M.G.L. c. 40A, §§ 7A and 5A was already vested in Wright's and Jacoubs' subdivision and the state could not impair that right by repeal.

II. Constitutional and rational construction of Statutes of 1975, Chapter 808, as amended by Statutes of 1977, Chapter 829, bars the application of any town by-law increasing lot size until September 18, 1981 (the end of the protected period), after all the lots were conveyed out and therefore buildable under substantially identical provisions of old M.G.L. c. 40A, § 5A or new M.G.L. c. 40A, § 6 or Falmouth by-law § 3421.

Former M.G.L. c. 40A, § 7A provided that:

> said provisions of the ordinance or by-law in effect at the time of the submission of the first submitted plan shall govern the land shown on such approved definitive plan, for a period of seven years from the date of endorsement of such approval *notwithstanding any other provision of law* . . . (emphasis added).

Thus, the legislature had the power and did delay the application of the new M.G.L. c. 40A and any other zoning change to September 18, 1981 with respect to these lots. 2 Singer, *Sutherland Statutory Construction*, § 33.07 "Postponement of time of taking effect" (4th Ed.). By prior statutory edict, the new M.G.L. c. 40A and other zoning changes had no application to the approved subdivision until September 18, 1981. At that time, the lots were held in separate ownership and were thus were buildable under the new Act's § 6; or § 5A of the former M.G.L. c. 40A; as well as § 3421 of the zoning by-laws of the Town of Falmouth. Any other interpretation is completely untenable.

Application of an earlier effective date for changes in zoning would violate elementary principles of reason and justice. If the lots were protected for a period of seven years by the former act, that protection did not disappear as if it had never existed when the seven years ran out. To apply earlier zoning, by-law or statutory amendments on that last day, nunc pro tunc, as the town did, is unjust and unconstitutional.

Once the provisions (i.e., protection from zoning changes) of former M.G.L. c. 40A, § 7A became applicable to an approved subdivision in 1974, no amendment (including repeal) could be applied retrospectively. *Murphy* v. *Planning Board of Norwell*, 5 Mass. App. Ct. 393, 363 N.E.2d 536 (1977) (based on federal and state constitutions); 1A Sands, *Sutherland Statutory Construction*, "Vested Rights," § 23.34

(4th ed.). As in *Murphy, supra,* the parties have obtained substantive rights in the subdivision which cannot be constitutionally abrogated by amendment or statutory enactment.

It is undisputed that the subdivision was subject to a zoning freeze from January 2, 1973 until September 18, 1981. At that time the lots were held in separate ownership. Building permits should have issued on the basis of any one or all three of the provisions of former M.G.L. c. 40A, § 5A, current M.G.L. c. 40A, § 6 or Falmouth Zoning By-Law 3421.

CONCLUSION

For the foregoing reasons, the appellants request that this Court note probable jurisdiction and set the case for plenary consideration.

Respectfully submitted,

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December 29, 1987

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Supreme Judicial Court for the Commonwealth

Office of the Clerk 1112 Court House Boston MA 02108 (617) 725-8055

No. FAR-4397 Date October 1, 1987

In re ROBERT F. WRIGHT & another

vs.

BOARD OF APPEALS OF FALMOUTH & another

In the Application for Further Review an Order has been entered that the Application is denied

Jean M. Kennett
Clerk

ROBERT F. WRIGHT & another[1] *vs.* BOARD OF APPEALS OF FALMOUTH & another[2] (and a companion case[3]).

Barnstable. March 19, 1987. — June 30, 1987.

Present: GREANEY, C.J., CUTTER, & SMITH, JJ.

Zoning, Lot, Exemption, Lot size, Amendment of by-law or ordinance. *Statute*, Construction, Repeal.

With respect to a definitive subdivision plan approved by a town's planning board on September 18, 1974, any protection provided by G. L. c. 40A, § 7A, as in effect prior to the substitution by St. 1975, c. 808, of a new c. 40A, expired no later than September 18, 1981, so that lot owners' 1982 and 1983 applications for building permits were governed by a 1977 amendment to the zoning by-law increasing the minimum size of residential lots in the area of the locus from 20,000 to 40,000 square feet. [412-413]

Whatever protection from the effect of zoning by-law amendments might still have been afforded in 1982 and 1983 by G. L. c. 40A, § 5A, as in effect prior to the substitution by St. 1975, c. 808, of a new c. 40A, was inapplicable to lots within a subdivision approved in 1974, where the lots were not shown to have complied with the applicable minimum area requirements in effect at that time. [413-414]

The fourth paragraph of G. L. c. 40A, § 6, as inserted by St. 1975, c. 808, providing that increases in the lot size requirements of a zoning by-law not apply to certain residential lots not held in common ownership, afforded no protection to subdivision lots which had been conveyed in a "checkerboard" pattern to separate owners after the date that the applicable zoning by-law was amended. [414-415]

CIVIL ACTIONS commenced in the Superior Court Department on July 13, 1982, and July 28, 1983, respectively.

[1] Edward L. Jacoubs.

[2] The building commissioner of Falmouth.

[3] Pamela Gilmore, trustee of Gilmore Falmouth Real Estate Trust, *vs.* Board of Appeals of Falmouth & another.

The cases were consolidated for trial and were heard by *James J. Nixon*, J.

Richard F. Benway for Pamela Gilmore.

Frank K. Duffy, Jr., Town Counsel, for Board of Appeals of Falmouth.

John D. Riordan for Robert F. Wright & another.

CUTTER, J. In 1973 Robert Wright and Edward Jacoubs (W & J) owned about forty acres of land (the locus) in Falmouth (the town). The facts stated below are based on "stipulated facts" in the record appendix.

A. *Stipulated Facts*

In Janaury, 1973, W & J submitted to the town planning board and to the town clerk a preliminary plan for the subdivision of the locus, which lay in an Agricultural C (AGC) zone. At that time, the Falmouth zoning by-law required for the locus a minimum lot size of 15,000 square feet. On March 5, 1973, W & J submitted a revised preliminary plan reducing the number of lots.

On March 5, 1973, also, the town at its annual town meeting voted to increase the minimum lot size to 20,000 square feet by changing all AGC land to an Agricultural B (AGB) zone. The Attorney General, on April 25, 1973, approved the amendment of March 5, 1973.

On September 25, 1973, W & J filed a definitive plan with the town planning board and with the town clerk under G. L. c. 41, § 81S. This was done within seven months of the filing on March 5, 1973, of the revised preliminary plan and complied (in this respect) with former G. L. c. 40A, § 7A, prior to the substitution by 1975, c. 808, of a new c. 40A, effective as of various dates as indicated in the margin.[4]

[4]This litigation in various respects requires consideration of statutory provisions of former G. L. c. 40A and the present c. 40A. These statutes are referred to hereafter, respectively, as "old c. 40A" and "new c. 40A." The confusing question of when new c. 40A became effective (and for what purposes) has been the subject of discussion in two decisions: *Casasanta* v. *Zoning Bd. of Appeals of Medford*, 377 Mass. 67, 69-74 (1979), and *Shalbey* v. *Board of Appeal of Norwood*, 6 Mass. App. Ct. 521, 522-527, & n.1 at 524 (1978), which greatly clarify the statutory provisions. The

On April 16, 1974, the town planning board approved the definitive plan subject to the execution by W & J of a developer's covenant under G. L. c. 41, § 81U. This covenant was executed and filed with the town planning board on September 18, 1974, and approval of the definitive plan was endorsed by the board on that day. The definitive plan was filed seasonably in the registry of deeds. On September 11, 1981, the town planning board accepted a surety bond for $54,582 from W & J "to guaranty [*sic*] that the ways within the subdivision would be finished" and released the lots in the subdivision from the covenant given at the time of the approval of the definitive plan on September 18, 1974.

On June 29, 1977, at a special town meeting, the locus was rezoned by the town from an AGB zone to an Agricultural A (AGA) zone. This rezoning increased the minimum size for residential lots in the area of the locus from 20,000 square feet to 40,000 square feet.

On and prior to September 14, 1981, all seventy-six lots shown on the subdivision plan belonged to W & J as tenants in common. On September 15, 1981, W & J, by deeds recorded in the registry of deeds on September 17, 1981, conveyed all the lots shown on the subdivision plan to themselves as individuals and to four named real estate trusts (including Gilmore Falmouth Realty Trust) in such a manner that no person or trust named as owner of a lot also was named as owner of any adjacent lot.[5]

dispositions of provisions of old c. 40A among sections of new c. 40A may be ascertained by examining St. 1975, c. 808, §§ 3, 6, and 7 (as amended by St. 1977, c. 829, § 4), and the note and table appearing in 5 M.G.L.A. 2-3 (West 1979). See also Healy, Massachusetts Zoning Practice under the Amended Zoning Enabling Act, 64 Mass. L. Rev. 757 (1979); Huber, The New Zoning Act, 23 Ann. Surv. Mass. Law, § 15.1 et seq. (1976).

[5] This type of division of lots adopted by W & J has been described as "checkerboarding." See *Baldiga* v. *Board of Appeals of Uxbridge*, 395 Mass. 829, 834 & n.4 (1985), and has been employed in an effort to avoid compliance with zoning or subdivision requirements. See also *Sturges* v. *Chilmark*, 380 Mass. 246, 260-261 (1980); 2 Anderson, American Law of Zoning, § 9.68 (3d ed. 1986); 2 Rathkopf, Law of Zoning & Planning, § 32.06 (1987) (where doubt is expressed, at 32-15 to 32-16, whether the device remains of significant usefulness in avoiding regulations); Mendler,

Pamela Gilmore, trustee of Gilmore Falmouth Realty Trust, as new owner of lot 35 within the subdivision shown on the definitive plan, in early 1982 applied to the town building commissioner (see note 2, *supra*) for a building permit to construct a single family residence on that lot. The application was denied by the commissioner and (on appeal from his decision under new c. 40A, § 15) by the town's board of appeals after public hearings. Similar 1983 appeals by Wright, as new owner of lot 72, and by Jacoubs as new owner of lot 70, were denied.

B. *The Pending Litigation*

Complaints were initiated in the Superior Court (a) by Wright and Jacoubs and by Mrs. Gilmore, as trustee, against the town board of appeals and the town building commissioner, alleging essentially the facts already stated. These complaints were consolidated for trial. On the stipulated facts, a judge of the Superior Court essentially affirmed the decision of the town's board of appeals, deciding three issues adversely to the plaintiffs with essentially only the cursory explanation of his reasoning set out in the margin.[6] From the judgments entered on this decision, Wright, Jacoubs, and Mrs. Gilmore appealed. The town also appealed "seeking a clarification of the . . . [judge's] reasoning for . . . [his] decision."

C. *Discussion*

1. The landowner plaintiffs contend that on September 18, 1974, when the town planning board endorsed the definitive

Massachusetts Conveyancers' Handbook, § 11:4.03 (3d ed. 1984 & Supp. 1987), where it is suggested that the Legislature "felt it needed to proscribe [checkerboarding] in the new" c. 40A, which the author (at least as to the new c. 40A, § 6) describes as "not clear in meaning or intent." See also the general discussion in *Lee* v. *Board of Appeals of Harwich*, 11 Mass. App. Ct. 148, 151 n.4 (1981).

[6]The three issues as stated by the trial judge were, "First: Could the plaintiffs avail themselves of the protection of . . . [old c. 40A, § 5A]? . . . Second: Did the plaintiffs properly avail themselves of the protection of . . . [old §] 5A so as to obtain permanent lot protection? . . . Third: did [the] plaintiffs otherwise obtain permanent lot protection under . . . [new §] 6?" As noted, the trial judge gave a negative answer to each of the three questions.

plan as approved, the by-law zoning provisions "in effect at the time of the submission of the first submitted plan . . . [began to] govern the" locus and did so "for a period of seven years from the date of [such] endorsement." For this contention, the plaintiffs rely on old c. 40A, § 7A.

2. To this contention, the town points out that the protection of old § 7A, as last amended by St. 1965, c. 366, § 1 (if it be assumed that old § 7A continued after the effective dates of new c. 40A to have any present effect at all), expired on September 18, 1981, and that no building permit was applied for by any plaintiff prior to early 1982, when Mrs. Gilmore applied for one, followed later (in 1983) by the other plaintiffs. The town thus correctly argues that each plaintiff applied for a building permit too late, i.e., after the expiration of the protection period. See *Building Inspector of Acton* v. *Board of Appeals of Acton*, 348 Mass. 453, 456 (1965); *Vazza* v. *Board of Appeals of Brockton*, 359 Mass. 256, 259-261 (1971). Compare *Smith* v. *Board of Appeals of Needham*, 339 Mass. 399, 402 (1959), where the exemption had not expired when application for a building permit was made.

3. The plaintiffs further contend that they are afforded protection by old c. 40A, § 5A, because they made their division of the locus lots by "checkerboard" conveyances (see note 5, *supra*) on September 15, 1981, just prior to the expiration (on September 18, 1981) of the old c. 40A, § 7A, exemption. Whether protection for these conveyances would be available under old § 5A, even if it continued to have any effect at all on September 15, 1981, depends upon careful examination of the language of old § 5A[7] (as well as of the new c. 40A).

[7]Old § 5A, as most recently amended (by St. 1961, c. 435, § 1) prior to the enactment of St. 1975, c. 808, § 3, in relevant part, read: "Any lot lawfully laid out by plan or deed duly recorded, as defined in section eighty-one L of chapter forty-one . . . [x] *which complies at the time of such recording or such endorsement, whichever is earlier*, with the *minimum area . . . requirements*, if any, of any zoning . . . by-law in effect in the . . . town where the land is situated, notwithstanding the adoption or amendment of provisions of a zoning . . . by-law in such . . . town imposing minimum area . . . requirements . . . in excess of those in effect at the time of such recording or endorsement (1) *may thereafter be built upon for*

4. The town contends that old § 5A, by its express terms, cannot have any effect in the present case because the lots portrayed on the definitive plan have not been shown to have complied with the lot size requirements of the then existing town zoning by-law on September 18, 1974 (the date of approval and endorsement of that plan by the planning board).[8] The locus had been placed by the town zoning by-law adopted on March 5, 1973, in an AGB zone, thus increasing to 20,000 square feet the minimum lot required in the neighborhood of the locus.[9] The language following the bracketed letter [x] in old § 5A, as quoted in note 7, *supra*, thus was not satisfied. Old § 5A has no application to the present case. Consequently, the plaintiffs cannot rely on the words in old § 5A following the bracketed letter [y], see note 7, *supra*.[10]

5. The provisions of old c. 40A, § 5A and old § 7A, so far as clearly continued at all (in respects here relevant) in new c. 40A, are found in new c. 40A, § 6. The first sentence of the fourth paragraph of new § 6, reads in part, "Any increase

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residential use if, at the time of the adoption of such requirements or increased requirements, or [y] while building on such lot was otherwise permitted, whichever occurs later, such lot *was held in ownership separate from that of adjoining land located in the same residential district . . .*" (emphasis supplied). The bracketed letters [x] and [y] are inserted to facilitate reference to the language immediately following those letters respectively.

[8] The by-law adopted March 5, 1973, became effective on April 25, 1973, when approved by the Attorney General. See G. L. c. 40, § 32, prior to its amendment by St. 1975, c. 808, § 1.

[9] It is probably the fact that the lots in the definitive plan for subdivision of the locus approved September 18, 1974, were in excess of 15,000 square feet in area but were not as large as 20,000 square feet. This fact does not seem to be stipulated or pleaded in the record in express terms, but it has not been shown by the stipulated facts that any lot in the approved subdivision exceeded 20,000 square feet.

[10] It probably is not necessary to hold in this case that old c. 40A, §§ 5A, and 7A, have been completely supplanted by new c. 40A. It, however, is obvious that, in view of the legislative history discussed in notes 4 and 5, *supra*, landowners face a heavy burden of persuasion to show that old §§ 5A and 7A have had continuing vitality since the dates set forth in St. 1975, c. 808, §§ 6 and 7, as amended by St. 1977, c. 829, § 4. See and compare the effect of new c. 40A in another context in *Bartlett* v. *Board of Appeal of Lakeville*, 23 Mass. App. Ct. 664, 667-670 (1987).

in area . . . of a zoning . . . by-law shall not apply to a lot for single and two-family residential use *which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land,* conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage . . ." (emphasis supplied). Despite the italicized language in this quotation, this sentence was interpreted in *Adamowicz* v. *Ipswich,* 395 Mass. 757, 762-763 (1985), *S.C.,* 772 F.2d 5 (1st Cir. 1985), as providing that the new § 6 looks to the most recent instrument of conveyance prior to the zoning change to establish the meaning of that language. As to the increases in minimum lot size affecting the locus, both occurred prior to the "checkerboarding" conveyances effected by W & J on September 15, 1981. As of the date of each of these lot size increases, all the lots shown on the subdivision plan were still owned by W & J. This, of course was also the case on January 1, 1976, and on June 30, 1978. See St. 1975, c. 808, § 7, as amended by St. 1977, c. 829, § 4. The new c. 40A, § 6, thus affords each of the plaintiffs no protection from the present zoning by-law lot size requirements.

6. The plaintiffs also gain no protection from § 3421 of the town zoning by-law which afforded protection only "to a lot shown on a plan or described in a deed duly recorded" at the registry as of January 1, 1981, as not "held in common ownership with any adjoining land, not otherwise protected by" new c. 40A, § 6.

Judgments affirmed.

IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

ROBERT F. WRIGHT and EDWARD L. JACOUBS, Plaintiffs-Appellants,	)	
v.	)	
ALFRED L. WELCH, III, RAYMOND R. LABOSSIERE, JULIA C. TAYLOR, as they are members of the Board of Appeals of the Town of Falmouth, Massachusetts and PETER GOODALE, as he is the Building Commissioner of the Town of Falmouth, Mass., Defendants-Appellees.	)	No. FAR 4397
PAMELA GILMORE, Trustee of Gilmore Falmouth Realty Trust, Plaintiff-Appellant,	)	
v.	)	
RAYMOND R. LABOSSIERE, JOSEPH COSTA, JR., ALFRED L. WELCH, III, as they are members of the Board of Appeals of the Town of Falmouth, Massachusetts, and PETER GOODALE, as he is the Building Commissioner of the Town of Falmouth, Massachusetts, Defendants-Appellees.	)	

JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Robert F. Wright, Edward L. Jacoubs and Pamela Gilmore, Trustee, the above-named appel-

lants, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Judicial Court of the Commonwealth of Massachusetts, denying further appellate review of the judgment for the defendants, entered October 1, 1987.

This appeal is taken pursuant to 28 U.S.C. sec. 1257(2).

Counsel for Appellants
Richard F. Benway
John D. Riordan
Sharon M. Harrington
BENWAY & HARRINGTON
265 Washington Street
Westwood, MA 02090
(617) 329-6611

CERTIFICATE OF SERVICE

I, Richard F. Benway, attorney for the appellants herein, hereby certify that I have this day served a copy of the within JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon all parties required to be served, by mailing a copy of same, first class postage prepaid, to the following:

Frank K. Duffy, Jr.,
Falmouth Town Counsel,
Farrell & Duffy,
P. O. Box Q,
Falmouth, MA 02541.

Dated: December 11, 1987

Richard F. Benway

IN THE APPEALS COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

ROBERT F. WRIGHT and EDWARD L. JACOUBS, Plaintiffs-Appellants,	)	
v.	)	
ALFRED L. WELCH, III, RAYMOND R. LABOSSIERE, JULIA C. TAYLOR, as they are members of the Board of Appeals of the Town of Falmouth, Massachusetts and PETER GOODALE, as he is the Building Commissioner of the Town of Falmouth, Mass., Defendants-Appellees.	)	
		Nos. 86-899
PAMELA GILMORE, Trustee of Gilmore Falmouth Realty Trust, Plaintiff-Appellant,	)	86-900
v.	)	
RAYMOND R. LABOSSIERE, JOSEPH COSTA, JR., ALFRED L. WELCH, III, as they are members of the Board of Appeals of the Town of Falmouth, Massachusetts, and PETER GOODALE, as he is the Building Commissioner of the Town of Falmouth, Massachusetts, Defendants-Appellees.	)	

AMENDED JOINT NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Robert F. Wright, Edward L. Jacoubs and Pamela Gilmore, Trustee, the above-named appel-

lants, hereby appeal to the Supreme Court of the United States from the final judgment of the Appeals Court of the Commonwealth of Massachusetts, affirming the judgments for the defendants, entered in this action on June 30, 1987.

This appeal is taken pursuant to 28 U.S.C. sec. 1257(2).

Richard F. Benway
Counsel for Appellants
Richard F. Benway
John D. Riordan
Sharon M. Harrington
BENWAY & HARRINGTON
265 Washington Street
Westwood, MA 02090
(617) 329-6611

AMENDED CERTIFICATE OF SERVICE

I, Richard F. Benway, attorney for the appellants herein, hereby certify that I have this day served a copy of the within AMENDED JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon all parties required to be served, by mailing a copy of same, first class postage prepaid, to the following:

Frank K. Duffy, Jr.,
Falmouth Town Counsel,
Farrell & Duffy,
P. O. Box Q,
Falmouth, MA 02541;

and that 28 U.S.C. sec. 2403(b) may be applicable and a copy of same was mailed, first class postage prepaid, to the following:

James M. Shannon, Esq.,
Attorney General of the
Commonwealth of Massachusetts,
One Ashburton Place,
Boston, MA 02108.

Dated: December 21, 1987

Richard F. Benway
Richard F. Benway

Commonwealth of Massachusetts

BARNSTABLE, ss. SUPERIOR COURT
No. 43321 and
42292

ROBERT F. WRIGHT et al[1]

VS.

BOARD OF APPEALS, TOWN OF FALMOUTH, et al

and

PAMELA GILMORE, TRUSTEE

VS.

BOARD OF APPEALS, TOWN OF FALMOUTH, et al

FINDINGS AND DECISION

The above-entitled two cases are consolidated by agreement of the parties for trial on stipulated facts filed in the Wright case.

Both cases involve the question of the protection of a subdivision from subsequent area increases contained in by-laws enacted after the filing of the preliminary plan.

FACTUAL BACKGROUND

On or about January 2, 1973, Wright and Jacoubs filed a preliminary plan with the Town Clerk of a subdivision of certain land containing 41.5 acres off Hayway Road, Falmouth. The land was divided into 95 lots, which complied with the zoning in effect.

[1] Edward L. Jacoubs

On March 5, 1973, as a result of a conference, a revised plan was filed showing 90 lots. On that same date the Town meeting voted changes in the zoning by-law which effectively increased the minimum area to 20,000 square feet from 15,000 square feet. (AG approved April 25, 1973)

On or about March 29, 1973, the Board disapproved the revised preliminary plan and on September 25, 1973, a definitive plan was filed complying with the seven-month rule set forth in section 81S, chapter 41.

On or about April 16, 1974, the Board approved the definitive plan subject to filing a developer's covenant. The approval was endorsed on September 18, 1974. (The Zoning on this date was 20,000 square feet.)

On or about June 29, 1977, a special Town meeting voted to increase the area requirements for a house lot to 40,000 square feet. (AG approved September 16, 1977)

On or about September 11, 1981, the Board released the so-called developer's covenant.

On September 14, 1981, all lots (now reduced through negotiation to 76) remained in the names of Robert F. Wright and Edward J. Jacoubs as tenants in common.

On or about September 15, 1981, Wright and Jacoubs, by several deeds, conveyed all of the lots out of common ownership.

Early in 1982 the plaintiff, Pamela Gilmore, as Trustee, applied for a building permit on Lot 35, which permit the Building Commissioner denied. An appeal to the Falmouth Board of Appeals upheld the Building Commissioner.

Similarly, in early 1983, the plaintiff Wright applied for a building permit on Lot 72 and the plaintiff Jacoubs applied for a building permit on Lot 70. Both requests were denied by the Building Commissioner and appeals to the Falmouth Board of Appeals upheld the Commissioner.

The actions of the Board of Appeals were appealed here under G. L. c. 40A, § 17.

THE LAW IN THIS CASE

Former Section 5A of Chapter 40A provided:

> Any lot lawfully laid out by plan or deed duly recorded . . . which complies at the time of such recording . . . with the minimum area . . . requirements . . . notwithstanding the adoption or amendment . . . of a zoning . . . by-law . . . imposing minimum area . . . in excess of those in effect at the time of such recording . . . (1) may thereafter be built upon for residential use if, at the time of the adoption of such requirements . . . or while building on such lot was otherwise permitted, . . . such lot was held in ownership separate from that of adjoining land.

Although repealed, this section has no effect, even if it is held to have conferred some substantive right, since the land was not in separate ownership on "the adoption of such (increased) requirements."

Former Section 7A of Chapter 40A, is not an issue. The defendant Town concedes the seven-year protection to the plaintiffs. Current section 6 of chapter 40A has the so-called grandfather provisions but has similar language to former section 5A when it says "was not held in common ownership with any adjoining land." Therefore, it avails the plaintiffs nothing.

Section 11 of chapter 40A applies to building permits when a change of zoning takes place and does not modify or extend the provisions of protection provided to subdivisions during the seven-year period the lots are protected.

FINDINGS

The plaintiffs urge a resolution of three issues which are dispositive in this case. First: Could the plaintiffs avail themselves of the protection of section 5A of chapter 40A?
Answer "no."

Second: Did the plaintiffs properly avail themselves of the protection of section 5A so as to obtain permanent lot protection?
Answer "no."

Third: "Did plaintiffs otherwise obtain permanent lot protection under section 6? Answer "no."

ORDER

It is ORDERED that judgments are to enter affirming the decisions of the Board of Appeals.

_____

Justice of the Superior Court

Dated: July 8, 1986.

A true copy, Attest:
Barbara Holmes Neil
Clerk

Board of Appeals
Falmouth, Massachusetts

D E C I S I O N

APPLICANT: Robert F. Wright and Edward L. Jacoubs

APPEAL NO.: 46-83

LOCATION OF PROPERTY: Lot #70 and #72,
MONHEGAN ROAD,
EAST FALMOUTH, MASS.

Under a date of April 27, 1983, Robert F. Wright and Edward L. Jacoubs of Falmouth, Mass., by letter to the Falmouth Town Clerk, stated that they are aggrieved by the decision of the Building Commissioner not to issue building permits on Lot #70 and #72, Monhegan Road, East Falmouth, Mass.

A public hearing was held on May 24, 1983, of which notice was duly given as required by Section 11, Chapter 40A, Mass. General Laws, as well as notice sent by mail to all persons deemed by the Board to be affected thereby as they appear on the tax list, and at which hearing all parties desiring to be heard were heard.

FINDINGS: By unanimous vote, the Board of Appeals, after carefully considering all of the facts and evidence presented at the hearing and after conferring with Town Counsel, hereby votes to uphold the decision of the Building Commissioner in not issuing building permits for Lot #70 and #72, Monhegan Road, East Falmouth, Ma.

The subdivision protection expired with the passing of seven (7) years, and the Board finds that checkerboarding the lots within this subdivision did not afford the applicants any addi-

tional protection. In order to obtain protection by checkerboarding, the lots must have conformed to the zoning at the time the checkerboarding took place. The checkerboarding took place in 1981 and at that time, the lots did not conform to the zoning by-laws.

NOW THEREFORE

BE IT RESOLVED, that the Board of Appeals, being of the opinion aforesaid, and acting under the provisions of the zoning by-laws, hereby votes to UPHOLD THE DECISION OF THE BUILDING COMMISSIONER.

ACTION: The Board of Appeals, consisting of Alfred L. Welch, III, Raymond Labossiere and Julia C. Taylor, being all present and voting as follows:

VOTE TO UPHOLD THE BUILDING COMMISSIONER:

WELCH:_____ Julia C. Taylor
Julia C. Taylor, Clerk

LABOSSIERE:_____

TAYLOR:Julia C. Taylor Date:July 8, 1983

Notice is given that any appeal from this decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after the date of filing of this decision in the office of the Law Clerk.

Building Department
FALMOUTH, MASSACHUSETTS
BUILDING COMMISSIONER
PLUMBING INSPECTOR
WIRE INSPECTOR

24 May 1983

Mr. John D. Riordan, Esq.

SUBJECT: DENIAL OF BUILDING PERMITS FOR LOTS 72 and 70 MONHEGAN ROAD ASSESSORS' MAP REFERENCE 20/6/50/70 and 72 AGA ZONE

Dear Sir:

I originally informed Dr. Wright on September of 1982 in a meeting with Town Counsel, Town Planner and myself that I would not issue the above referenced permits. My reasons now, as then, follow:

The Subdivision Plan was endorsed on September 17, 1974. At that time the zoning was AGB. The plan when endorsed showed undersized lots (protected by plan submission).

The Zoning changed in June of 1977 to AGA, at that time the lots were protected by the subdivision protection of Chapter 40A, Section 6, paragraph 6.

The subdivision protection expired on September 17, 1981, with no Building Permits issued prior to that date. On September 17, 1981 the lots were put into single ownership. However, Chapter 40A, Section 6, paragraph 4 allows single ownership protection to lots which "conformed to the then existing requirements". At that time, although the lots were protected, they were not conforming (and had never been) and, therefore, not eligible for the single lot exemption.

The lots in question were in common ownership on 1 January 1981 and, therefore, ineligible for the protection of Section 3422 of the Zoning By-Law.

For these reasons I have and will continue to refuse Building Permits for these and other lots in the subdivision.

Sincerely,

Peter C Goodale
PETER C. GOODALE
BUILDING COMMISSIONER
ida

Massachusetts General Laws.

Relevant portions of former M.G.L. c. 40A, section 5A provide:

> Any lot lawfully laid out by plan or deed duly recorded . . . which complies at the time of such recording or such endorsement, whichever is earlier, with the minimum area, frontage, width, and depth requirements, if any, of any zoning ordinance or by-law in effect in the city or town where the land is situated . . . (1) may thereafter be built upon for residential use if, at the time of the adoption of such requirements or increased requirements, or while building on such lot was otherwise permitted, whichever occurs later, such lot was held in ownership separate from that of adjoining land located in the same residential district . . . .

Former M.G.L. c. 40A, section 7A provides in part:

> When a preliminary plan . . . has been submitted to a planning board . . . the land shown on such preliminary plan and on the definitive plan evolved therefrom . . . shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of submission of the plan first submitted while such plan or plans are being processed under said subdivision control law; and, if said definitive plan becomes approved . . . said provisions of the ordinance or by-law in effect at the time of the submission of the first submitted plan shall govern the land shown on such approved definitive plan, for a period

of seven years from the date of endorsement of such approval notwithstanding any other provision of law;

. . . .

Statutes of 1975, c. 808, section 3 provides:

> The General Laws are hereby amended by striking out chapter 40A and inserting in place thereof the following chapter: (current chapter 40A).

Statutes of 1975, c. 808, section 7 provides:

> This act shall take effect on January first, nineteen hundred and seventy-six as to zoning ordinances and by-laws and amendments, other than zoning map amendments, adopted after said date.

Statutes of 1977 c. 829, section 4 amending St. 1975, c. 808, section 7 provides:

> Zoning ordinances and by-laws in effect on said date shall continue to be governed by the provisions of chapter forty A of the General Laws in effect prior to said date until this act is accepted by each respective city or town, provided that no later than June thirtieth, nineteen hundred and seventy-eight all zoning ordinances and by-laws shall be brought into conformity with the provisions of this chapter and shall be governed hereby, and thereafter no provisions of chapter forty A in effect prior to January first, nineteen hundred and seventy-six shall govern zoning ordinances and by-laws.

Relevant portions of current M.G.L. c. 40A, section 6 provide:

> Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage . . . .

Section 3421 of the Zoning By-Laws of the Town of Falmouth provides:

> Any increase in area, or lot width requirements in the Zoning By-law shall not apply to a lot shown on a plan or described in a deed duly recorded at the Registry of Deeds as of 1 January 1981 for single family residential use which at the time of the Zoning By-law change was not held in common ownership with any adjoining land, not otherwise protected by Section 6 of Chapter 40A of the Massachusetts General laws, conformed to then existing requirements and had at least Seven Thousand Five Hundred Square Feet of area and fifty feet of frontage.

6

(2)

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. [illegible], JR.
CLERK

No. 87-1096

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT F. WRIGHT, EDWARD L. JACOUBS AND PAMELA GILMORE, TRUSTEE OF THE GILMORE FALMOUTH REALTY TRUST,
APPELLANTS,

v.

ALFRED L. WELCH, III, RAYMOND R. LABOSSIERE, JULIA C. TAYLOR AND JOSEPH COSTA, AS THEY ARE OR WERE MEMBERS OF THE BOARD OF APPEALS OF THE TOWN OF FALMOUTH, MASSACHUSETTS AND PETER GOODALE, AS HE IS THE BUILDING COMMISSIONER OF THE TOWN OF FALMOUTH, MASSACHUSETTS,
APPELLEES.

ON APPEAL FROM THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Appellees' Motion to Dismiss Appeal and Memorandum of Law in Support

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(617) 540-4111
Attorneys for Appellees, Falmouth Board of Appeals and Falmouth Building Commissioner

January 28, 1988

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

17pp

No. 87-1096

In the

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT F. WRIGHT, EDWARD L. JACOUBS AND PAMELA GILMORE, TRUSTEE OF THE GILMORE FALMOUTH REALTY TRUST,
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v.

ALFRED L. WELCH, III, RAYMOND R. LaBOSSIERE, JULIA C. TAYLOR AND JOSEPH COSTA, AS THEY ARE OR WERE MEMBERS OF THE BOARD OF APPEALS OF THE TOWN OF FALMOUTH, MASSACHUSETTS AND PETER GOODALE, AS HE IS THE BUILDING COMMISSIONER OF THE TOWN OF FALMOUTH, MASSACHUSETTS,
APPELLEES.

ON APPEAL FROM THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Motion to Dismiss Appeal

Appellees, Board of Appeals of the Town of Falmouth and Building Commissioner of the Town of Falmouth, hereby move this Honorable Court for an Order dismissing the appeal pre-

sented or in the alternative to affirm the Judgment of the Appeals Court of Massachusetts for the reason that this appeal is not within the Court's jurisdiction and that the questions sought to be reviewed were not timely or properly raised below. For grounds, Appellees rely upon the reasons and authorities more fully set out in the Brief of Appellees served contemporaneously herewith.

Respectfully submitted,

GEORGE H. LEBHERZ, JR.
MUNSON, LEBHERZ & TURKINGTON
Town Hall Square
Falmouth, Massachusetts 02540
(617) 548-6600

Dated: January 28, 1988

CERTIFICATION

I hereby certify that a true copy of the within was mailed, postage prepaid, to Richard F. Benway, Esq., Benway & Harrington, 265 Washington Street, Westwood, MA 02090 on this 28th day of January, 1988.

/s/ _____
GEORGE H. LEBHERZ, JR., ESQ.

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No. 87-1096

In the

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT F. WRIGHT, EDWARD L. JACOUBS AND PAMELA GILMORE, TRUSTEE OF THE GILMORE FALMOUTH REALTY TRUST,
APPELLANTS,

v.

ALFRED L. WELCH, III, RAYMOND R. LaBOSSIERE, JULIA C. TAYLOR AND JOSEPH COSTA, AS THEY ARE OR WERE MEMBERS OF THE BOARD OF APPEALS OF THE TOWN OF FALMOUTH, MASSACHUSETTS AND PETER GOODALE, AS HE IS THE BUILDING COMMISSIONER OF THE TOWN OF FALMOUTH, MASSACHUSETTS,
APPELLEES.

ON APPEAL FROM THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Appellees' Memorandum of Law in Support of Their Motion to Dismiss Appeal

Statement of the Case

Nature of the Case

This is a zoning appeal pursuant to Massachusetts General Laws c. 40A. Appellants Wright and Jacoubs (hereafter W & J)

appealed to the Barnstable Superior Court after the Building Commissioner denied them building permits and the Falmouth Zoning Board of Appeals upheld the decision of the Building Commissioner.

On March 5, 1973, the case was tried on the following stipulated facts:

1. At some time prior to January 2, 1973, W & J acquired approximately 41.5 acres of land lying off Hatch's Hayway Road in Falmouth, Barnstable County, Massachusetts, hereinafter referred to as "locus".

2. On or about January 2, 1973, W & J filed a preliminary plan of locus with the Falmouth Planning Board and with the Falmouth Town Clerk under the provisions of Massachusetts General Laws c. 41, § 81S, dividing locus into 95 lots.

3. On or about January 3, 1973, locus lay in an Agricultural "C" zone (AGC) under the Falmouth Zoning By-Law and the minimum size for residential lots in such a zone was 15,000 square feet.

4. On or about March 5, 1973, W & J filed a revised preliminary plan of locus with the Falmouth Planning Board and with the Falmouth Town Clerk under the provisions of Massachusetts General Laws c. 41, § 81S, re-dividing locus into 90 lots.

5. On the same day, March 5, 1973, the Falmouth annual town meeting, acting upon Article 39 of the Warrant, voted to amend the Falmouth Zoning By-Law and changed all land in the Town of Falmouth zoned Agricultural "C" zone (AGC) to an Agricultural "B" zone (AGB).

6. The result of the town meeting action increased the minimum size for residential lots from 15,000 square feet to 20,000 square feet.

7. On or about March 29, 1973, the Falmouth Planning Board disapproved the revised preliminary plan, submitted by W & J and referred to in paragraph 4 above.

8. On or about April 25, 1973, the Attorney General approved the zoning amendment adopted March 5, 1973, changing the zoning of locus from AGC to AGB.

9. On or about September 25, 1973, W & J filed a definitive plan of locus with the Falmouth Planning Board and with the Falmouth Town Clerk under the provisions of Massachusetts General Laws c. 41, § 81S, dividing locus into 76 lots. This definitive plan was filed within seven months of the revised preliminary plan referred to in paragraph 7 above, and the minimum lot size in effect on the date of filing of the revised preliminary plan (March 5, 1973), i.e., 15,000 square feet, applied as provided by St. 1957, c. 297 (formerly designated Massachusetts General Laws c. 40A, § 7A).

10. On or about April 16, 1974, the Falmouth Planning Board approved the definitive plan subject to W & J executing an approved developer's covenant as provided in Massachusetts General Laws c. 41, § 81U. Said covenant was executed and filed with the Falmouth Planning Board on September 18, 1974 and thereafter both the approved definitive plan and covenant were filed in the Barnstable County Registry of Deeds (Land Court). Approval of said plan was endorsed thereon on September 18, 1974.

11. On or about September 14, 1981, all 76 lots in the subdivision belonged to W & J, as tenants in common.

12. On or about June 29, 1977, a Falmouth Special Town Meeting, acting upon Article 4 of the Warrant changed the zoning of the locus from an Agricultural "B" zone (AGB) to an Agricultural "A" zone (AGA) and as a result, increased the minimum size for residential lots from 20,000 square feet to 40,000 square feet.

13. On or about September 16, 1977, the Attorney General approved the zoning amendment adopted June 29, 1977, changing the zoning district.

14. During the year 1981, W & J began construction of the ways within the subdivision.

15. On or about September 11, 1981, the Falmouth Planning Board accepted a surety bond from W & J in the amount of $54,582.00 to guaranty that the ways within the subdivision would be finished in accordance with the Planning Board's rules and regulations and released the lots in the subdivision from the covenant referred to in paragraph 10 above.

16. On or about September 15, 1981, W & J, by several deeds recorded in the Barnstable County Registry of Deeds on September 17, 1981, conveyed lots in the subdivision as follows:

a. To Gilmore Falmouth Realty Trust, Lots 2, 5, 7, 10, 14, 17, 20, 24, 27, 30, 32, 35, 42, 47, 50, 53, 56, 66, 71 and 76. See Certificate of Title No. 86794.

b. To Robert F. Wright, Lots 3, 6, 9, 15, 16, 21, 23, 28, 36, 40, 43, 52, 57, 62, 67 and 72. See Certificate of Title No. 86795.

c. To Marathon Realty Trust, Lots 8, 22, 29, 37, 44, 58, 61, 63, 68, 74 and 77. See Certificate of Title No. 86797.

d. To 76 Nominee Trust, Lots 73, 78, 79, 80, 81 and 82. See Certificate of Title No. 86793.

e. To New Swyma Realty Trust, Lots 12, 18, 26, 33, 39, 45, 48, 54, 59, 64 and 69. See Certificate of Title No. 86798.

f. To Edward L. Jacoubs, Lots 1, 4, 11, 13, 19, 25, 31, 34, 38, 41, 46, 49, 51, 55, 60, 65 and 70. See Certificate of Title No. 86796.

17. Sometime in early 1982, Pamela Gilmore, Trustee of Gilmore Realty Trust, owner of Lot 35 within the subdivision, applied to the Falmouth Building Commissioner for a permit to build a single family residence on Lot 35, and the Building Commissioner denied the application. Pursuant to Massachusetts General Laws c. 40A, § 15, the trustee appealed to the

Falmouth Board of Appeals. The Board of Appeals held a public hearing on March 30, 1982. By a decision filed with the Falmouth Town Clerk on June 24, 1982, the Board of Appeals denied the trustee the requested relief.

18. Sometime in early 1983, Robert F. Wright, owner of Lot 72, and Edward L. Jacoubs, owner of Lot 70, applied to the Falmouth Building Commissioner for a permit to build a single family residence on their respective lots, and the Building Commissioner denied their applications. Pursuant to Massachusetts General Laws c. 40A, § 15, both owners appealed to the Falmouth Board of Appeals. The Board of Appeals held a public hearing on May 24, 1983. By a decision filed with the Falmouth Town Clerk on July 8, 1983, the Board of Appeals denied the requested relief.

No other facts were introduced into evidence.

The Superior Court, following a trial de novo, at which no constitutional issues were considered, upheld the decision of the Board of Appeals. The Appeals Court, following an appeal of the Superior Court's Decision by Appellants containing no references in the Notice of Appeal or argument to any federal question, decided to uphold the Decision of the Superior Court.

Thereafter, the Appellants filed an Application for Further Appellate Review to the Supreme Judicial Court of Massachusetts citing and (for the first time) briefing questions regarding the constitutionality of the zoning statute.

The Supreme Judicial Court denied further appellate review and this appeal ensued, originally as an appeal from the decision of the Supreme Judicial Court, and then amended to an appeal of the decision of the Appeals Court of the Commonwealth of Massachusetts.

Argument

I. No Federal Question Is Presented Here and None of the Issues Raised Below Are Significant Enough To Command the Plenary Jurisdiction of This Court.

In an appeal under Massachusetts General Laws c. 40A, § 17, any person aggrieved by a decision of the Board of Appeals may appeal to the Superior Court. No answer is required by the Defendant Board of Appeals. The Court hears all the evidence, determines the facts and decides the relief to be granted to the petitioner. This appeal process is the exclusive remedy for those aggrieved by a Board of Appeals decision and the Superior Court hearing is a trial de novo.

> On appeal to the Superior Court, the judge is required to hear the matter de novo and determine the legal validity of the decision of the board upon the facts found by him . . . [and i]n making his findings, the judge is not allowed to give the board's findings or decision evidentiary weight . . . nor may he make findings which . . . constitute a "mere repetition of statutory words."

Josephs v. *Board of Appeals of Brookline*, 362 Mass. 290, 295, 285 N.E.2d 436, 439 (1972) (citations omitted).

Therefore, a thorough inquiry was launched into the facts of this case at the Superior Court level with separate independent findings by the judge. At no time did the Plaintiff amend his complaint to add an additional count for declaratory judgment or any other relief challenging the validity of the state statutory scheme of the Zoning Enabling Act. The Court decided the case based on state law and without reference to any substantial federal question.

Appellants, in their jurisdictional statement, rely on *Ettor* v. *Tacoma*, 228 U.S. 148, 33 S.Ct. 428 (1913), which has no application here. The facts of *Ettor* concerned the constitutionality under the Fourteenth Amendment of a Washington statute in regard to damages for changing the grade of streets. The fact that, in *Ettor*, the petitioner's property was "damaged for public purposes," referred to an act of the Washington legislature requiring the city of Tacoma to make compensation for consequential damages due to an original street grading. Pending Ettor's action for damages inflicted upon his abutting property in consequence of an original street grading, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage, was amended so as to provide that the act should not apply to the original grading of any street. *Id.*, 228 U.S. at 154.

This case is distinguishable from the one at bar. In *Ettor* the statute imposed an obligation to compensate abutters injured by an original grading. The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. *Id.* at 155. What the Court said in *Ettor* is that if the subsequent repealing statute leaves the party a substantial remedy, the legislature does not exceed its authority. The Court went on to say that this was an action for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made, and therefore the right to compensation was a vested property right.

In the instant case there was no injury prior to the repeal of the zoning act. The Appellants were not deprived of a vested property right by the passing of the "new" zoning statute. Before the enactment of St. 1975, c. 808, § 3, they had seven years of protection for their subdivision plan. After its enactment, they still had seven years of protection.

Appellants also cite *Coombes* v. *Getz*, 285 U.S. 434, 52 S.Ct. 435 (1932), where a contractual obligation arose between a corporation and its creditors, and the right to enforce it having become vested comes within the protection of both the contract impairment clause in Article 1, § 10 and the due process of law clause in the Fourteenth Amendment of the Federal Constitution. *Id.* at 448.

It is clear that this case has no application here. Zoning regulations are not contracts on the part of the public authorities enacting them in any sense which precludes their subsequent amendment. *Reichelderfer* v. *Quinn*, 287 U.S. 315, 53 S.Ct. 177 (1932).

One who has obtained a building permit or license and has proceeded to act under it has thereby acquired a vested right which is protected against disturbance by a subsequent amendment of the zoning ordinance. *Dobbins* v. *Los Angeles*, 195 U.S. 223, 25 S.Ct. 18 (1904). Here there are no vested rights, since no such attempt was made by Appellants. Indeed their failure to begin road construction until more than six years had elapsed, and to take any action to obtain a building permit within the seven year protected period suggests that the Appellants' dilemma was caused by their own inattention rather than by an amendment to the zoning enabling act by the Massachusetts legislature.

IIA. The Federal Questions Sought To Be Reviewed Here Were Not Properly Raised Below.

A review of the record will show that this attempt to challenge the court's decision based on federal law was not brought before the Appeals Court of the Commonwealth of Massachusetts. In the notice of appeal (Appendix p. 59), summary argument (Appendix p. i) and decision of the Appeals Court (Juris Statement, Appendix p. 2A) no reference was made to the

constitutional question now sought to be presented by Appellants' Amended Joint Notice of Appeal to the court (Appendix p. 11a).

Accordingly, Appellees respectfully submit that, pursuant to Supreme Court Rule 16.1(b), Appellants' failure to timely and properly raise below the federal questions now sought to be reviewed constitutes a sufficient basis upon which to dismiss this appeal.

It is well settled that the prerequisite for jurisdiction for this Court is the presentation of issues below.

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York*, 293 U.S. 52, 54, 55 S.Ct. 16, 17 (1934).

The Supreme Court has jurisdiction, if the record shows claim of invalidity of a state statute was fairly and timely presented with fair precision. *New York ex. rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63 (1928).

IIB. The Questions Presented Are Insubstantial.

In Massachusetts, the new zoning act was adopted by Chapter 808 in 1975.

Appellees argue that the old zoning act, as to subdivisions approved prior to the adoption of c. 808, survived the adoption of c. 808. Their position is that they are governed by § 5A and § 7A of the old zoning act.

In the preamble to c. 808, it is clear that the intent of the legislature was that the act would take effect January 1, 1976, and all zoning ordinances and by-laws must be brought into compliance by June 30, 1978. There is no retroactive deprivation of rights of the Appellants. Under § 7A of the old zoning act, a developer who submitted a preliminary plan before the effective date of a change in the zoning by-law received protection from subsequent changes in the by-law for seven years from the date of endorsement of the plan. After the adoption of c. 808, and with the enactment of the present c. 40A, § 6, the developer has the exact same right of seven year protection.

Appellants also allege loss of substantive rights under the old § 5A. The evidence demonstrated that Appellants did not attempt to exercise their rights until 1981, a full *six years* after § 5A was repealed.

The old 5A provided a method for extending the period a lot could be built upon by conveying lots into separate ownership "while otherwise buildable." The qualifying condition imposed by the statute was that *the lot conform to the zoning at the time of recording* or endorsement, whichever occurs earlier. In this case, where Appellants "checkerboarded" the lots, they did *not* conform to the zoning. At the time of recording, the lots were undersized.

In effect, Appellants are arguing that, for them, the effective date of the 1977 increase in minimum lot size is September 18, 1981. Not so. All land in the town was affected by the increase in minimum lot size. Even though Appellants were protected by the freeze through § 6, the lots did not conform.

Appellants' argument, as set forth in the Jurisdictional Statement, appears to suggest that they are aggrieved by the Massachusetts legislature changing state law and not by any action of the Falmouth Building Commissioner or the Board of Appeals, who are merely interpreting state law.

IIC. The Massachusetts Court of Appeals and the Supreme Judicial Court Interpreted Massachusetts Law in Deciding This Case.

There is no substantial federal question here, because the Appeals Court, in its decision (Appendix p. 6a), said the Petitioners applied for a building permit too late, i.e., after the expiration of the protection period. Both the new and old c. 40A provided the same seven year protection of which they failed to take advantage.

In addition, the court found that even if the old § 5A did apply here, Petitioners could not take advantage of it since they failed to meet the statutory requirement that the lots comply with minimum area requirements at the time of recording. The Appeals Court further found that the new c. 40A, § 6 offered Petitioners no relief, because the attempt to "checkerboard" the lots took place after both zoning changes. New § 6 offers protection for lots in common ownership prior to a zoning change.

The entire case was resolved by the Massachusetts Supreme Judicial Court and by the Appeals Court for the Commonwealth interpreting Massachusetts law, and therefore no federal question arises.

> This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review [in the United States Supreme Court] . . . must show that we have jurisdiction of the case.

Department of Mental Hygiene v. *Kirchner*, 380 U.S. 194, 197, 85 S.Ct. 871, 873 (1965) (footnote omitted).

Conclusion

In view of the previously stated reasons, this appeal must be dismissed and the judgment of the Appeals Court of the Commonwealth of Massachusetts upheld.

Respectfully submitted,

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